

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH T.,

Plaintiff,

V.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C22-1146-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

Plaintiff appeals a final decision of the Commissioner of the Social Security Administration (Commissioner) denying Plaintiff's application for disability benefits after a hearing before an administrative law judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is REVERSED and REMANDED for further administrative proceedings.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1978.¹ Plaintiff has a college education and previously worked as a consultant, business owner, director, and football player. AR 38, 68–69. Plaintiff filed an application for Disability Insurance Benefits (DIB) on June 5, 2019, alleging disability

¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 beginning December 1, 2013. AR 15. The application was denied at the initial level and on
 2 reconsideration. On April 28, 2021, the ALJ held a telephone hearing and took testimony from
 3 Plaintiff and a vocational expert (VE). AR 28–72. On May 27, 2021, the ALJ issued a decision
 4 finding Plaintiff not disabled for the period between the alleged onset date and December 31, 2017,
 5 the date last insured. AR 15–23. Plaintiff timely appealed. The Appeals Council denied Plaintiff's
 6 request for review on July 6, 2022, making the ALJ's decision the final decision of the
 7 Commissioner. AR 1–6. Plaintiff appeals this final decision of the Commissioner to this Court.

JURISDICTION

9 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

STANDARD OF REVIEW

11 This Court's review of the ALJ's decision is limited to whether the decision is in
 12 accordance with the law and the findings are supported by substantial evidence in the record as a
 13 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). “Substantial evidence” means more
 14 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
 15 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
 16 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
 17 decision, the Court must uphold the ALJ's decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th
 18 Cir. 2002).

DISCUSSION

20 The Commissioner follows a five-step sequential evaluation process for determining
 21 whether a claimant is disabled. *See* 20 C.F.R. § 404.1520.

22 At step one, the ALJ found that Plaintiff had not engaged in substantial gainful activity
 23 since the alleged onset date through his date last insured of December 31, 2017. AR 17.

1 At step two, the ALJ found that Plaintiff has the following medically determinable
2 impairments: Hashimoto thyroiditis; hypothyroidism; chronic traumatic encephalopathy;
3 headaches; residual effects of concussions; residual effects of injuries; spine disorders; foot
4 disorder, status post surgery; and joint disorders, status post surgeries. AR 17. However, the ALJ
5 found that Plaintiff's impairments did not rise to the level of severe, either alone or in combination,
6 through the date last insured. AR 18. Because the ALJ found Plaintiff not disabled at step two, the
7 ALJ did not reach steps three through five of the sequential analysis.

8 Plaintiff raises the following issues on appeal: (1) Whether the ALJ properly considered
9 the medical evidence when finding that Plaintiff had no severe impairments prior to the expiration
10 of his date last insured; and (2) whether the ALJ properly considered Plaintiff's subjective
11 allegations. Plaintiff requests remand for further administrative proceedings. The Commissioner
12 argues the ALJ's decision has the support of substantial evidence and should be affirmed.

13 1. Medical Evidence

14 The regulations effective March 27, 2017, require the ALJ to articulate how persuasive the
15 ALJ finds medical opinions and to explain how the ALJ considered the supportability and
16 consistency factors. 20 C.F.R. § 404.1520c(a)–(b). The “more relevant the objective medical
17 evidence and supporting explanations presented” and the “more consistent” with evidence from
18 other sources, the more persuasive a medical opinion or prior finding. *Id.* at § 404.1520c(c)(1)–
19 (2). Further, the Court must continue to consider whether the ALJ's analysis is supported by
20 substantial evidence. *Woods v. Kijakazi*, 32 F.4th 785, 787 (9th Cir. 2022); *see also* 42 U.S.C. §
21 405(g) (“The findings of the Commissioner of Social Security as to any fact, if supported by
22 substantial evidence, shall be conclusive . . .”). With these regulations and considerations in
23 mind, the Court proceeds to its analysis of the medical evidence in this case.

1 A. Chronic brain concussions; back, shoulder, and elbow injuries

2 Plaintiff argues that the ALJ failed to fully consider all the relevant medical evidence
 3 documenting the severity of Plaintiff's impairments, including multiple concussions and numerous
 4 injuries to Plaintiff's back, shoulder, and elbow. Dkt. 8, at 4. Plaintiff identifies treatment records
 5 with Dr. Edward La Cava, M.D., between March 2016 and April 2017 and argues that these records
 6 show that Plaintiff experienced ongoing short-term memory difficulties, constant pain in his right
 7 hand, wrist, elbow, and shoulder, mood swings, and fatigue. *Id.* at 4. Dr. La Cava diagnosed
 8 Plaintiff with hypothyroidism, history of concussions and chronic traumatic encephalopathy,
 9 hyperlipoproteinemia, and right thyroid nodule. *Id.*; *see* AR 405, 408, 417. The ALJ considered
 10 Dr. La Cava's treatment records and determined that the records showed that Plaintiff "had an
 11 intact neurological exam without focal motor deficits" and a largely negative 14-point review of
 12 systems; was able to engage in physical fitness, exercise, and "strenuous" farming activities; was
 13 managing a successful active wear clothing company; and attributed his mood swings to having
 14 two young children who "put a lot of demands on his time and sleep cycle." AR 20–23 (citing AR
 15 402, 404, 421–23). The ALJ reasonably found that the medical evidence did not show that
 16 Plaintiff's impairments had more than a minimal effect on Plaintiff's ability to work. *See Smolen*
 17 *v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) ("An impairment or combination of impairments
 18 can be found 'not severe' only if the evidence establishes a slight abnormality that has 'no more
 19 than a minimal effect on an individual's ability to work.'" (quoting Social Security Ruling (SSR)
 20 85-28)). Plaintiff fails to identify error in the ALJ's evaluation of this evidence, and the ALJ's
 21 evaluation of these medical records has the support of substantial evidence. Therefore, Plaintiff
 22 has not shown that the ALJ erred in considering Plaintiff's treatment records with Dr. La Cava.

23 Plaintiff argues that the ALJ improperly discounted medical evidence dated after Plaintiff's

1 date last insured. Dkt. 8, at 5–6. Plaintiff identifies medical records from September 2018, October
 2 2018, and March 2019 describing Plaintiff’s treatment for musculoskeletal pain, including pain in
 3 the cervical and low back; left knee, hip, and foot; and right shoulder, elbow, thumb, and wrist.
 4 *Id.*; *see* AR 588–96, 601–02. The ALJ rejected this evidence because it “postdate[s] the date last
 5 insured and does not necessarily reflect the claimant’s functioning during the relevant period.” AR
 6 20. “[R]eports containing observations made after the period for disability are relevant to assess
 7 the claimant’s disability.” *Smith v. Bowen*, 849 F.2d 1222, 1225 (9th Cir. 1988). Here, the records
 8 from September 2018, October 2018, and March 2019 describe pain symptoms that Plaintiff
 9 reported were chronic, had been present for many years from football injuries, and have stayed the
 10 same and worsened. AR 587, 590, 593. Because this evidence is relevant to the alleged disability
 11 period, the ALJ erred by rejecting the evidence because it postdated Plaintiff’s date last insured.

12 However, the ALJ’s error was harmless in this case because the ALJ gave other valid
 13 reasons for rejecting the September 2018, October 2018, and March 2018 evidence. *See Stout v.*
 14 *Comm’r of Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006) (an ALJ’s error may be deemed
 15 harmless where it is “inconsequential to the ultimate nondisability determination”). The ALJ found
 16 that the September 2018 record also indicated that Plaintiff had full range of motion of the right
 17 shoulder and right wrist and ambulated with normal gait, that the October 2018 record indicated
 18 that Plaintiff “had pain-free range of motion of the hips, knees, and ankles and had a grossly intact
 19 lumbar spine sensory examination,” and that the March 2019 MRI of Plaintiff’s left hip indicated
 20 “mild chronic appearing tendinopathy” and grade two chondral wear. AR 20. The ALJ thus
 21 provided other valid reasons for finding that the medical evidence failed to show that Plaintiff was
 22 significantly limited in her ability to perform basic work activities. *See* 20 C.F.R. § 404.1522(a)
 23 (an impairment or combination of impairments is “not severe if it does not significantly limit [the

1 claimant's] physical or mental ability to do basic work activities"). Therefore, the ALJ's error was
2 harmless because the ALJ provided other valid reasons for finding that the September 2018,
3 October 2018, and March 2018 medical evidence did not show Plaintiff's impairments met the
4 severity requirement at step two.

5 B. Hashimoto hypothyroid

6 Plaintiff argues that the ALJ "either overlooked or misinterpreted" the opinion of Dr.
7 Gordon Hale, M.D., who found Plaintiff's thyroid dysfunction to be a severe impairment and
8 assessed environmental limitations. Dkt. 8, at 8. The ALJ found Dr. Hale's opinion to be
9 unpersuasive. AR 22. The ALJ found that the doctor's explanation, which indicated that Plaintiff
10 was asymptomatic, that Plaintiff's thyroid function was assessed as normal, and that Plaintiff's
11 physical exams have been grossly intact without focal motor deficits, did not support the doctor's
12 assessment of environmental limitations. AR 22 (citing AR 85). Under the supportability factor,
13 "[t]he more relevant the objective medical evidence and supporting explanations presented by a
14 medical source are to support his or her medical opinion(s) . . . the more persuasive the medical
15 opinions . . . will be." 20 C.F.R. § 404.1520c(c)(1). Plaintiff argues that the ALJ failed to explain
16 how Dr. Hale's explanation, which involved physical functioning, related to Dr. Hale's assessment
17 of environmental limitations. Dkt. 8, at 8–9. Because Dr. Hale relied on evidence of Plaintiff's
18 physical exams and thyroid function to support his opinion, the ALJ properly found the doctor's
19 explanation inconsistent with the doctor's assessment of environmental limitations. Therefore, the
20 ALJ thus properly evaluated the persuasiveness of Dr. Hale's opinion according to the regulatory
21 factors, and the ALJ's determination has the support of substantial evidence.

22 Plaintiff argues that the ALJ also erred by rejecting the opinion of Dr. J.D. Fitterer, M.D.,
23 who found Plaintiff's thyroid dysfunction to be severe but indicated that the record was insufficient

1 to evaluate the claim. Dkt. 8, at 8. Plaintiff argues that the ALJ is required to resolve this
 2 inconsistency on remand. *Id.* Plaintiff identifies no authority to support the notion that an ALJ
 3 must resolve an inconsistency within a physician's opinion. To the contrary, an ALJ may reject a
 4 physician's statement that is internally inconsistent. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1216
 5 (9th Cir. 2005) (an ALJ properly rejects a physician's opinion that contradicts or is inconsistent
 6 with the doctor's own notes or observations). Here, the ALJ found Dr. Fitterer's opinion
 7 unpersuasive and inconsistent with the evidence, including evidence that Plaintiff was able to
 8 perform physical fitness and exercise and that Plaintiff "retained functional abilities during the
 9 relevant period." AR 21. An ALJ may reject a medical opinion that is inconsistent with the record.
 10 *See Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008). Therefore, the ALJ provided valid
 11 reasons for rejecting Dr. Fitterer's opinion, and Plaintiff has not shown that the ALJ erred in
 12 finding the doctor's opinion to be unpersuasive.

13 C. Chronic headaches

14 Plaintiff argues that the ALJ improperly found Plaintiff's headaches² to be non-severe
 15 based on evidence that, during the hearing, Plaintiff reported experiencing a headache yet was able
 16 to answer questions and proceed with the hearing. Dkt. 8, at 9 (citing AR 21). Plaintiff argues that
 17 the ALJ "does not have the expertise to evaluate what clinical findings are necessary to corroborate
 18 Plaintiff's claims." *Id.* There is no indication that the ALJ improperly made an independent medical
 19 assessment of Plaintiff's impairments—indeed, the ALJ found that Plaintiff's headache
 20 impairment was medically determinable. AR 17. Further, an ALJ does not err by basing his
 21 decision in part on the ALJ's observations of the claimant during the hearing. *See Morgan v.*
 22

23

² Plaintiff refers to Plaintiff's headaches as "migraines," however, the evidence indicates that Plaintiff
 alleges experiencing "headaches." *See* AR 211, 243, 293.

1 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). Therefore, Plaintiff has not shown
2 that the ALJ improperly considered the ALJ's own observations of Plaintiff's ability to proceed
3 with the hearing despite experiencing a headache when evaluating the severity of Plaintiff's
4 headache impairment.

5 Plaintiff further argues that the ALJ failed to fully consider the evidence relating to
6 Plaintiff's headaches. Dkt. 8, at 9–10. Plaintiff refers to a headache questionnaire, completed by
7 Plaintiff, describing that his headaches were frequent and recurrent, brought on by lack of sleep or
8 pain in the back, shoulders, and neck, and made it difficult for him to maintain focus, function, or
9 tolerate exposure to noise and light. Dkt. 8, at 10 (citing AR 574–81). In addition to Plaintiff's
10 ability to proceed with the hearing, the ALJ found that Plaintiff's activities "suggest that he
11 retained functional abilities," including evidence of Plaintiff's ability to drive, exercise, care for
12 himself and his kids, take phone calls, attend aquatic therapy, manage a successful clothing
13 company, and farm. AR 21. The ALJ reasonably found that this evidence did not show that
14 Plaintiff's headaches significantly limited his ability to perform basic work activities. Plaintiff's
15 alternative interpretation of the evidence does not deprive the ALJ's equally rational interpretation
16 of substantial evidence. *See Morgan*, 169 F.3d at 599. Therefore, Plaintiff has not shown that the
17 ALJ improperly evaluated the medical evidence relating to Plaintiff's headaches.

18 D. Atrial fibrillation

19 Plaintiff argues that the ALJ failed to consider the medical evidence relating to Plaintiff's
20 atrial fibrillation. Dkt. 8, at 10. Plaintiff refers to evidence from February 2019 indicating that
21 Plaintiff was seen in the emergency room for heart palpitations with symptoms of chest tightness,
22 lightheadedness, and feelings of near syncope. *Id.* (citing AR 635–51). The ALJ noted that this
23 evidence "postdates the claimant's date last insured and does not necessarily reflect the claimant's

1 functioning during the relevant period.” AR 21. The records from February 2019 expressly state
 2 that Plaintiff had “[n]o prior similar symptoms” and no history of heart attack, heart failure, or
 3 stroke. AR 638. Further, Plaintiff has not alleged a severe cardiac or heart impairment. *See* AR
 4 211–18, 243. Therefore, there is no evidence indicating that Plaintiff’s atrial fibrillation in
 5 February 2019 is relevant to the alleged disability period or Plaintiff’s claims for disability. *See,*
 6 *c.f.*, *Smith*, 849 F.2d at 1225. Plaintiff has not shown that the ALJ improperly evaluated the
 7 evidence relating to Plaintiff’s atrial fibrillation.

8 **2. Subjective Testimony**

9 The ALJ must provide specific, clear, and convincing reasons, supported by substantial
 10 evidence, for rejecting a claimant’s subjective symptom testimony.³ *Trevizo v. Berryhill*, 871 F.3d
 11 664, 678 (9th Cir. 2017); *Smolen*, 80 F.3d at 1286. An ALJ may reject a claimant’s symptom
 12 testimony when it is contradicted by the medical evidence, but not when it merely lacks support in
 13 the medical evidence. *See Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th
 14 Cir. 2008) (“Contradiction with the medical record is a sufficient basis for rejecting a claimant’s
 15 subjective testimony.”); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005) (“[L]ack of medical
 16 evidence cannot form the sole basis for discounting pain testimony.”).

17 Plaintiff alleges that he cannot work because he has arthritis and ligament damage in his
 18 hands, and right elbow and shoulder impairments that make it difficult for him to type and use a
 19 mouse for the computer. AR 211. Plaintiff further alleges that his cervical and lumbar spine
 20 impairment requires him to frequently reposition and stretch from a seated position and that he
 21

22 ³ Effective March 28, 2016, the Social Security Administration (SSA) eliminated the term “credibility”
 23 from its policy and clarified the evaluation of a claimant’s subjective symptoms is not an examination of
 character. SSR 16-3p. The Court continues to cite to relevant case law utilizing the term credibility.

1 experiences pain from sitting for more than a few minutes. AR 211. Plaintiff alleges that his right
2 hip impairment requires him to extend his left leg while sitting, that headaches make it difficult
3 for him to focus and concentrate, and that his impairments make it hard for him to retain
4 information and perform physical work. AR 211.

5 The ALJ found that, after considering the evidence of record, Plaintiff's "medically
6 determinable impairments could have reasonably been expected to produce some of the alleged
7 symptoms; however, the claimant's statements concerning the intensity, persistence and limiting
8 effects of these symptoms are not entirely consistent." AR 19.

9 Plaintiff argues that, in discussing Plaintiff's allegations, the ALJ improperly "relied on a
10 summary of the medical evidence" and did not "explain the significance of the evidence he was
11 citing nor did he explain what specific allegations might be undermined by this summary." Dkt. 8,
12 at 13. The ALJ "is required to consider the claimant's subjective symptoms, such as pain or fatigue,
13 in determining severity." *Smolen*, 80 F.3d at 1286. Here, the ALJ discussed the medical evidence
14 and determined that the medical record "is consistent with a finding that the claimant retained
15 functional abilities and is consistent with a finding that the claimant's impairments were non-
16 severe through the date last insured of December 31, 2017." AR 19–23. However, nowhere in the
17 ALJ's decision does the ALJ identify what specific testimony the ALJ rejected and what evidence
18 the ALJ found to be inconsistent with that testimony. The Court "cannot review whether the ALJ
19 provided specific, clear, and convincing reasons for rejecting [a claimant's] pain testimony where,
20 as here, the ALJ never identified which testimony [they] found not credible, and never explained
21 which evidence contradicted that testimony." *Brown-Hunter v. Colvin*, 806 F.3d 487, 494 (9th Cir.
22 2015). Therefore, the ALJ failed to provide clear and convincing reasons for rejecting Plaintiff's
23 subjective symptom testimony.

1 The ALJ's error in this case was not harmless. Because the ALJ failed to provide
2 reviewable reasons for rejecting Plaintiff's symptom testimony, the Court "cannot discern the
3 agency's path" and cannot "meaningfully determine whether the ALJ's conclusions were
4 supported by substantial evidence." *Id.* (internal citations and quotation marks omitted). Although,
5 as discussed above, Plaintiff has not shown that the ALJ erred in considering the objective medical
6 evidence relating to Plaintiff's impairments, the ALJ must consider a claimant's symptoms when
7 determining severity. 20 C.F.R. § 404.1529(d)(1). Here, the ALJ failed to provide clear and
8 convincing reasons for rejecting Plaintiff's symptoms testimony and failed to consider Plaintiff's
9 testimony when assessing the severity of Plaintiff's impairments at step two. Therefore, the Court
10 must reverse the matter for further administrative proceedings so that the ALJ may properly
11 evaluate the Plaintiff's symptom testimony when determining whether Plaintiff has a severe
12 medically determinable impairment at step two.

CONCLUSION

14 For the reasons set forth above, this matter is REVERSED and REMANDED for further
15 administrative proceedings.

16 DATED this 31st day of March, 2023.


MARY ALICE THEILER
United States Magistrate Judge

ORDER
PAGE - 11